



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-92-4\*

### FACTS:

You are the Secretary to the Board of Trustees of Roxbury Community College (“Roxbury” or “the College”). You have submitted, on Roxbury’s behalf, the following facts. In making this request, you have waived confidentiality. We also understand that this request has been submitted to us with the knowledge and permission of Dr. Hubert Jones.

In the wake of the termination of the previous president of Roxbury, the Roxbury Trustees, while searching for a new president for the College, believe it incumbent upon them to take advantage of this interim period to undertake an independent and professional assessment of the policies, operations of, and educational programs offered at Roxbury. In order to accomplish those tasks, the Trustees have decided to appoint an Acting President. Several candidates, including Dr. Hubert Jones of Boston University, either applied for the position or were brought to the attention of the Board as qualified and interested in the position. Roxbury’s Trustees reviewed the submitted resumes and interviewed two candidates, one of whom was Dr. Jones.

You inform us that Dr. Jones is the Dean of the Boston University Graduate School of Social Work and a professional educator and college administrator with a long and distinguished record of achievement and accomplishment in the fields of education and educational administration. Dr. Jones also shares the Roxbury Trustees’ view that the College should take advantage of this interim period to engage in a thorough-going self-study and to take steps to correct any misdirection or other problems in mission, policies, administration or operations that may be found to exist.

The Roxbury Trustees, finding Dr. Jones to be the candidate best able to undertake the work just described for the College, offered him the position of Acting President. Dr. Jones then obtained a paid leave of absence from his present employer, Boston University, and accepted the position. We understand that Dr. Jones has no written contractual right to take a paid leave of absence from Boston University. However, Boston University has, from time to time, granted paid leave in the past to certain of its employees on a selective basis. We also understand from you that Dr. Jones’ paid leave of absence was granted by Boston University prior to his negotiations over the details of his employment arrangement with Roxbury, but that Boston University was aware of the reasons why Dr. Jones sought the paid leave.

The arrangement worked out between the Roxbury Trustees and Dr. Jones is as follows. For a period of several months, Dr. Jones will serve as Acting President of Roxbury while on a paid leave of absence from his position of Dean of the Graduate School of Social Work at Boston University. During this time, Dr. Jones will work at his Roxbury responsibilities at least four days per week, and he will be available to Boston University for any matters which may arise in connection with the Graduate School of Social Work up to one day per week. Dr. Jones will serve at Roxbury on a pro bono basis, not receiving any salary or benefits from Roxbury, other than reimbursement for expenses incurred in the course of his duties for Roxbury. It is understood and agreed that, notwithstanding the paid aspect of his leave from Boston University, Dr. Jones will serve as Acting President of Roxbury as if he were a full-time employee of Roxbury, with his full focus and loyalty to the College. Thus, as Acting President of Roxbury, Dr. Jones will not be acting in any capacity relating to Boston University, nor will Boston University or any other personnel of the University have any role in Dr. Jones’ position as Acting President or the policy and management of the affairs of Roxbury, except as may be expressly approved by the Roxbury Trustees. (You inform us that from time to time over the years, Boston University personnel, as well as personnel from other area colleges and universities, have consulted with or advised Roxbury on various matters.) Finally, Dr. Jones’ service at Roxbury will be at the pleasure of the Trustees of the College. The Trustees retain the right to terminate Dr. Jones’ services at any time. These terms and conditions were negotiated between the College’s Trustees and Dr. Jones without input from Boston University.

Dr. Jones has served as a Trustee of the Roxbury Community College Foundation. He has stated his intention to resign from the Foundation Board as soon as his appointment as Acting President of Roxbury is approved. He has so notified the Foundation Board, which understands and also supports the arrangement. Accordingly, Dr. Jones has not asked the Commission to consider what effects, if any, his membership on the Foundation would have on him under the conflict of interest law while serving as Acting President of Roxbury.

The College does not offer any program in competition with the programs of Boston University's Graduate School of Social Work. Moreover, the College is not aware of any pending proposals that would arise during Dr. Jones' limited period of service for the College that would conflict with programs of Boston University. Further, during the period of his service as Acting President of Roxbury, Dr. Jones would not participate in any negotiations with any state agencies on behalf of Boston University.

In addition, Boston University has disclosed to this Commission that a wholly-owned subsidiary has a contract with Roxbury to operate Roxbury's bookstore. We have been advised that the contract, by its terms, will not be up for renewal or consideration during Dr. Jones' tenure as Acting President. In any event, we have been informed that Dr. Jones will not participate, as Acting President, in any discussions or actions which concern that contract or the bookstore.

The Commission has conducted no independent investigation of the facts. However, we understand that Boston University concurs with the facts as described herein by you on Roxbury's behalf.

#### **QUESTION:**

Is the proposed arrangement between Dr. Jones and Roxbury Community College permissible within the confines of the conflict of interest law?

#### **ANSWER:**

Yes, provided that a statute or regulation authorizes the arrangement. In addition, certain other restrictions are applicable to Dr. Jones as described herein.

#### **DISCUSSION:**

In his capacity as Acting President of Roxbury Community College, Dr. Jones would become a "special state employee" as that term is used in the conflict of interest law.<sup>1/</sup> As such, certain provisions of G.L. c. 268A, the conflict of interest law, would become applicable to Dr. Jones, as discussed below.<sup>2/</sup>

#### **Section 4**

Except as otherwise provided by law for the proper discharge of official duties, §4 of c. 268A prohibits a state employee from acting as agent or attorney for, or being compensated by, anyone other than the Commonwealth in relation to any particular matter<sup>3/</sup> in which the Commonwealth or a state agency is a party or has a direct and substantial interest. As to special state employees, this section will apply to only those matters in which he participates<sup>4/</sup> as a state employee, or which are under his official responsibility<sup>5/</sup> as a state employee, or which are pending in his agency. This last restriction applies only if he serves as a special state employee for more than sixty days in any consecutive period of three hundred and sixty-five days. *See EC-COI-91-5; 85-49.*

Section 4, in brief, is designed to prohibit divided loyalties. In other words, a state employee is a state employee first and foremost and owes a duty of loyalty to the Commonwealth. Consequently, §4 is designed to prohibit an individual from splitting his loyalties between a state job and a private interest. *See generally EC-COI-90-12; 90-16; see also Buss, The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 322 (1965) (whenever a person is both a private and a public employee, "[t]he appearance of potential impropriety is raised - influence peddling, favoring his private connections, and cheating the government. Whether or not any or all of these evils result, confidence in government is undermined because the public cannot be sure that they will not result").

This section has two pertinent applications to Dr. Jones' arrangement. First, Dr. Jones, as a special state employee, cannot represent (whether or not for compensation) Boston University, or any non-state third party, before any state agency if the matter on which he is personally appearing is one in which he participates as Roxbury's Acting President, or one which falls within his official responsibility as Roxbury's Acting President, or one which is pending in Roxbury (provided that the sixty day period is met). You should know that "personally appearing" includes not only physical appearances, but also telephone contact, correspondence, or any contact made with the intent to influence. *EC-COI-87-27*.

Second, and more critical to the entire proposed arrangement itself, Dr. Jones cannot receive compensation<sup>6/</sup> from Boston University, or any non-state third party, "in relation to" his pro bono services at Roxbury because the Commonwealth has a direct and substantial interest in who is chosen to serve as Roxbury's President or Acting President. The concern is that Dr. Jones might feel beholden, first and foremost, to the private employer who is continuing to pay his salary (Boston University), at the expense of his public employer (Roxbury).

You maintain that the restrictions of §4 do not apply to the present arrangement because Dr. Jones' paid leave was granted by Boston University "by virtue of his tenure and seniority at the institution and his agreement to be available to the School of Social Work on a minimal but on-going basis throughout the leave." It is clear, however, that Dr. Jones has no specific contractual or other entitlement to a paid leave of absence. Consequently, we must conclude that absent a prior written policy or contractual arrangement which explicitly establishes the conditions under which Boston University employees are entitled to take a paid leave of absence, Dr. Jones' paid leave case was granted "in relation to" a particular matter in which the Commonwealth is a party or has a direct and substantial interest.

Any other determination in the present case would mean that the Commission, in all similar future cases, would be required to determine the subjective intention of the parties who seek to create such arrangements. In other words, we would have to determine whether paid leave was given in relation to the state employee's work on a case-by-case basis, necessarily expending limited staff resources to investigate all of the circumstances surrounding the proposed arrangement. On the other hand, by requiring that paid leave policies be established in writing and in advance of a request for such leave, we can establish a standardized way to review all future situations on an equal basis. That review could then clearly establish whether a given paid leave was granted in relation to the state services to be provided.<sup>7/</sup>

Consequently, because Boston University has no prior written policy which clearly articulates the conditions under which Dr. Jones is eligible for a paid leave, we must find that the above §4 analysis is applicable. Therefore, the contemplated arrangement is prohibited by §4 because Boston University would be paying Dr. Jones compensation in relation to his services at Roxbury.

Notwithstanding the above, however, §4 provides that the arrangement would be permissible if it were "as provided by law for the proper discharge of official duties." In other words, if Dr. Jones' arrangement with Boston University is authorized by statute or regulation, §4 would not prohibit it. *See EC-COI-84-119* (enabling statute contemplated the type of employment arrangement proposed whereby a private corporation would provide the services of one of its employees to a state agency and would continue to pay his salary and benefits); *EC-COI-88-5* (regulation can substitute for statutory requirement that an arrangement be "as provided by law").

In *EC-COI-88-5*, this Commission recognized that the "as provided by law" language of §3 can be met by the promulgation of a regulation. Similarly, we hold here that the "as provided by law" language of §4 can also be met by a regulation duly promulgated by a governmental agency authorized to do so.

For example, a regulation which would authorize the contemplated arrangement as "provided by law for the proper discharge of official duties" might include the following:

the community colleges, from time to time as necessary to carry out and discharge their official duties, may appoint volunteer administrative and/or other personnel who shall receive no compensation from the Commonwealth; provided, however, that such volunteer personnel may receive compensation from their private employer, if any, for the period of time during which they are providing voluntary services to the Commonwealth.<sup>8/</sup>

Accordingly, if an appropriate statute or regulation authorizes the proposed voluntary arrangement — that is, Dr. Jones continues to receive compensation from Boston University while providing voluntary services at Roxbury — §4 would not prohibit the proposed arrangement on the terms described above.<sup>9/</sup>

Finally, assuming that Dr. Jones' arrangement is permissible as described above, other provisions of the conflict of interest law will apply to Dr. Jones.

## **Section 6**

Section 6 prohibits a state employee from participating in a particular matter in which he, an immediate family member, or a business organization in which he is serving as an officer, director, trustee, partner or employee has a direct or reasonably foreseeable financial interest. Such a financial interest can be of any size and may be either positive or negative.

This section would prohibit Dr. Jones from acting in his state position at Roxbury in any matter which could affect Boston University's financial interests. You have advised the Commission that Dr. Jones will not so participate, including matters involving Roxbury's bookstore or its contract with a wholly-owned Boston University subsidiary to operate that bookstore. If, however, such a matter should come before him, he is advised that he must disclose the nature of the matter and the financial interest to the State Ethics Commission and his appointing authority (the Board of Trustees). The Board must then either (i) assign the matter to another employee; (ii) assume responsibility for that matter itself; or (iii) make a written determination that Boston University's interest is not so substantial as to be deemed likely to affect the integrity of the services the Commonwealth may expect from Dr. Jones. See *EC-COI-85-32*. Both the disclosure and the determination must be filed with this Commission as public documents. *G.L. c. 268A, §6(a)(3); EC-COI-90-12; 90-16*.

## **Section 23**

Finally, there are several sections of §23 of which Dr. Jones should be made aware. First, §23(b)(2) prohibits a state employee from using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value (\$50 or more) which are not available to others similarly situated.

This section would, for example, prohibit the use of public resources to benefit a private interest. Also, in making any official decisions, he must keep separate his own private interests, i.e., that Boston University is continuing to pay him during his leave of absence. See *EC-COI-91-3*. He may not use state time, personnel, facilities, equipment (telephones, copiers, fax machines), titles, etc. in conducting a private business, and must arrange his schedule with his private employer, Boston University, so that it does not conflict with his responsibilities at Roxbury. *EC-COI-91-6; 91-7*. For example, he must use care that, in the event of an emergency at Boston University which demands his attention, Dr. Jones not forego his obligations at Roxbury in order to respond to Boston University's needs. He may, of course, work on such matters on his own time.

Section 23(b)(3) prohibits a state employee from acting in a manner which would cause a reasonable person to conclude that any person could improperly influence or unduly enjoy his favor in the performance of his official duties. This appearance of a conflict of interest can be dispelled, however, by making a full written disclosure to the appointing authority concerning the facts of the matter. Nothing in your letter raises an issue under this section at this time.

In addition, §23(c) prohibits a state employee from disclosing or using confidential information gained on his state job for a private benefit. Confidential information is any information which cannot be obtained through a public records request.

You should also be aware that §7 of c. 268A prohibits a state employee from having a direct or an indirect financial interest in a contract made by a state agency, unless an exemption applies. For example, Dr. Jones, as a special state employee at Roxbury, cannot provide any compensated services to other state agencies (whether on his own or through Boston University), unless he first complies with an exemption found in §7. Two subsections in particular, §7(d) and §7(e), apply to special state employees, although other exemptions may also apply. Nothing in your opinion request raises an issue under this section at this time. Please renew your opinion

request if you seek further guidance on this section.

Finally, certain restrictions will arise under G.L. c. 268A, §5 after Dr. Jones completes his services at Roxbury. He should renew his opinion request if he has any specific questions concerning §5.

**Date Authorized: February 19, 1992**

\*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

<sup>1/</sup>"Special state employee," a state employee:

1. who is performing services or holding an office, position, employment or membership for which no compensation is provided, or
2. who is not an elected official and (a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or (b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(o).

Dr. Jones' status as a special state employee results from paragraph (2)(a), above. Accordingly, a proper disclosure of such classification or permission must be filed with this Commission. If you so choose, we can treat your opinion request as the appropriate disclosure.

<sup>2/</sup>You should also be advised that the reporting requirements of G.L. c. 268B, §5, the financial disclosure law, will be applicable to Dr. Jones if he serves more than thirty days in any calendar year in certain designated major policy-making positions, including the Acting Presidency of Roxbury. He may wish to contact the Commission's Financial Disclosure Division for more detailed information as to his obligations and rights under c. 268B.

<sup>3/</sup>"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>4/</sup>"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

<sup>5/</sup>"Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

<sup>6/</sup>"Compensation," any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

<sup>7/</sup>We emphasize that a written policy would not be required in those situations where a private employer intentionally seeks to fund a state position by supplying one or more of its employees to a governmental agency for an interim period of time. In that case, it is clear that the restrictions of §4 will apply and that a statute or a regulation is needed to authorize the private compensation. *See EC-COI-84-119*. On the other hand, where the parties maintain that paid leave is not being granted "in relation to" the government services to be provided, a written paid leave policy or contractual arrangement must have been previously established by the employer if the Commission is to find that §4 does not apply. The Commission may, however, later determine that a given paid leave policy or contractual arrangement does not protect the compensation from the restrictions of §4.

<sup>8/</sup>This Commission will make its staff available to Roxbury or HECC in order to provide further guidance as to the contents of any regulation issued pursuant to this opinion, and we would encourage you to use this method of working within the confines of §4. Roxbury must determine, of course, whether it, HECC, or some other entity, is empowered to promulgate an appropriate regulation which would encompass the proposed arrangement.

<sup>9/</sup>We conclude, however, that G.L. c. 15A, §22, as appearing in St. 1991, c. 142, §7, an amended statute which established the Higher Education Coordinating Council (replacing the Board of Regents) (HECC), would not provide the necessary statutory relief required in the present case.

Specifically, §22 of c. 15A states that:

[e]ach board of trustees of a community college or state college shall be responsible for establishing those policies necessary for the administrative management of personnel, staff services and the general business of the institution under its authority.

We find that §22 is not specific enough to justify a reliance on it for purposes of authorizing the contemplated arrangement “as provided by law,” because it does not reflect explicit legislative authorization of this sort of arrangement.